IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU

FOAD J. MOHAMMAD Claimant **COVENANT CONSTRUCTION SERVICES, LLC.** Employer	**DIA APPEAL NO. 20IWDUI0039** **IWD APPEAL NO. 20A-UI-01768** **ADMINISTRATIVE LAW JUDGE DECISION** **OC: 01/26/20** **Claimant: Appellant (1)**

Iowa Code § 96.5(1)d – Voluntary Quitting/Illness or Injury
Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant/appellant filed an appeal from the February 21, 2020 (reference 01) unemployment insurance decision that denied benefits based upon him voluntarily quitting work because he thought his work was detrimental to his health. The decision indicated the claimant did not demonstrate by competent medical evidence that he was required to leave his employment and that his quitting was not caused by the employer. The parties were notified of the hearing to take place on April 17, 2020. At hearing, it was discovered that the notice was not timely delivered to all parties and a brief postponement was granted. A telephone hearing was subsequently held on April 21, 2020. The claimant, Foad Mohammed, participated personally and was represented by attorney Samuel Aden. Arabic translation services were provided at the request of the claimant. Claimant's exhibits 1-3 were admitted. The employer, Covenant Construction Services, LLC, participated through human resources office manager, Jodee Claussen. The employer's exhibits 1-6 were admitted. Charles Freking participated as a witness for Covenant Construction Services, LLC.

ISSUES:

Did claimant voluntarily quit the employment with good cause attributable to employer?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds:

Claimant began working on a project with Covenant Construction Services, LLC on October 18, 2018. Claimant was employed and supervised by CBF Concrete, LLC, during the time he worked on the Covenant Construction project, but was temporarily added to the Covenant Construction Services, LLC payroll. His last day physically worked on the job was July 1, 2019. Claimant was a full-time concrete laborer and his supervisor was the owner of CBF Concrete, LLC, Charles Freking.

On November 6, 2018, Claimant injured his knee at work. He attended medical appointments on November 8, 9, and 16, 2018. At the November 16th medical appointment the provider indicated claimant was ready to be released back to work at full duty. Claimant subsequently had surgery on his knee on May 16, 2019. He returned to the Covenant Construction worksite on May 22, 2019 with restrictions from his surgeon. He was required to walk on level ground and was restricted from lifting more than ten pounds. Claimant continued to experience knee pain following his return to work.

Mr. Freking supervised the claimant on the Covenant Construction jobsite following his return to work post surgery. He provided the claimant with work activities that met his restrictions when they were available. Such limited activities were not always available. There were times the claimant declined to come in for activities that met the restrictions. Ultimately, Mr. Freking informed the Claimant that if he could not perform work at the Covenant Construction jobsite he would have to leave. Claimant did not return to the Covenant Construction jobsite after July 1, 2019, but he continued to work for CBF Concrete, LLC at alternate jobsites.

Jodee Clausen did not consider the claimant to be an employee of Covenant Construction Services, LLC. She was aware of his knee injury and agreed that reasonable accommodations should be made when claimant returned to work with restrictions. Ms. Clausen understood Mr. Freking told the claimant he needed to leave the Covenant Construction jobsite if he could not perform work.

According to claimant, he did not quit his work at the Covenant Construction jobsite. He contends he was asked to lift more than ten pounds, and his injury was aggravated. Claimant testified that Mr. Freking told him not to return to the Covenant Construction jobsite and gave him work at a different site. He confirmed that Mr. Freking was his supervisor throughout his work at the Covenant jobsite, and he only communicated with Covenant Construction through Mr. Freking.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes as follows:

While the employer has the burden to establish the separation was a voluntary quitting of employment rather than a discharge, claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code § 96.6(2). The separation must be considered a voluntary quit and not a discharge from employment.

Iowa Code § 96.5(1)d provides:

> An individual shall be disqualified for benefits:
>
> 1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:
>
> d. The individual left employment because of illness, injury or pregnancy upon the advice of a licensed and practicing physician, and upon knowledge of the necessity for absence immediately notified the employer, or the employer consented to the absence, and after recovering from the illness, injury or pregnancy, when recovery was certified by a licensed and practicing physician, the individual returned to the employer and offered

to perform services and the individual's regular work or comparable suitable work was not available, if so found by the department, provided the individual is otherwise eligible.

Iowa Admin. Code r. 871-24.25(35) provides:

Voluntary quit without good cause. In general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5. However, the claimant has the initial burden to produce evidence that the claimant is not disqualified for benefits in cases involving Iowa Code section 96.5, subsection (1), paragraphs "a" through "i," and subsection 10. The following reasons for a voluntary quit shall be presumed to be without good cause attributable to the employer:

(35) The claimant left because of illness or injury which was not caused or aggravated by the employment or pregnancy and failed to:

(a) Obtain the advice of a licensed and practicing physician;
(b) Obtain certification of release for work from a licensed and practicing physician;
(c) Return to the employer and offer services upon recovery and certification for work by a licensed and practicing physician; or
(d) Fully recover so that the claimant could perform all of the duties of the job.

(36) The claimant maintained that the claimant left due to an illness or injury which was caused or aggravated by the employment. The employer met its burden of proof in establishing that the illness or injury did not exist or was not caused or aggravated by the employment.

The court in *Gilmore v. Empl. Appeal Bd.*, 695 N.W.2d 44 (Iowa Ct. App. 2004) noted that:

"Insofar as the Employment Security Law is not designed to provide health and disability insurance, only those employees who experience illness-induced separations that can fairly be attributed to the employer are properly eligible for unemployment benefits." *White v. Emp't Appeal Bd.*, 487 N.W.2d 342, 345 (Iowa 1992) (citing *Butts v. Iowa Dep't of Job Serv.*, 328 N.W.2d 515, 517 (Iowa 1983)).

Subsection d of Iowa Code § 96.5(1) provides an exception; however, the statute specifically requires that the employee has recovered from the illness or injury, and this recovery has been certified by a physician. The exception in section 96.5(1)(d) only applies when an employee is fully recovered and the employer has not held open the employee's position. *White*, 487 N.W.2d at 346 (Iowa 1992); *Hedges v. Iowa Dep't of Job Serv.*, 368 N.W.2d 862, 867 (Iowa App. 1985); see also *Geiken v. Lutheran Home for the Aged Ass'n.*, 468 N.W.2d 223, 226 (Iowa 1991)(noting the full recovery standard of section 96.5(1)(d)). In the *Gilmore* case he was not fully recovered from his injury and was unable to show that he fell within the exception of section 96.5(1)(d). Therefore, because his injury was not connected to his employment and he had not fully recovered, he was considered to have voluntarily quit without good cause attributable to the employer and was not entitled to unemployment benefits. See *White*, 487 N.W.2d at 345.

Claimant's medical condition was documented he returned to the worksite with specific restrictions from his surgeon. Claimant was offered work activities that met his restrictions, but

they were limited. His supervisor advised that if he could not do the work at the Covenant jobsite he should leave, and he found work for him at another jobsite. Claimant denies quitting his work at the Covenant jobsite, but confirmed that he did not return to the site after July 1, 2019 and he continued to work for Mr. Freking at alternate sites. This case is complicated by the fact that that all of the participants appear to agree that the claimant was an employee of CBF Concrete, LLC, and not Covenant Construction Services, LLC, during all times relevant to this matter. Despite claimant's denial of an intention to quit employment at Covenant, he was actually working for CBF Concrete and left the Covenant Construction worksite at the direction of his supervisor. He was not discharged from work by CBF Concrete LLC, he was reassigned to a different worksite.

Accordingly, the Claimant's separation was without good cause attributable to Covenant Construction LLC and benefits must be denied.

DECISION:

The February 21, 2020 (reference 01) unemployment insurance decision is affirmed. Claimant was separated from the employment without good cause attributable to employer. Unemployment benefits are withheld in regards to this employer until such time as claimant is deemed eligible.

Emily Kimes-Schwiesow
Administrative Law Judge

May 1, 2020

Decision Dated and Mailed

EKS/lb

CC: Foad Mohammad, Claimant (By first class mail)
Samuel Aden, Attorney for Claimant (By first class mail)
Covenant Construction, LLC. (By first class mail)
Nicole Merrill, IWD (By email)
Joni Benson, IWD (By email)

Note to Claimant: This decision determines you are not eligible for regular unemployment insurance benefits. If you disagree with this decision you may file an appeal to the Employment Appeal Board by following the instructions on the first page of this decision. Individuals who do not qualify for regular unemployment insurance benefits due to disqualifying separations, but who are currently unemployed for reasons related to COVID-19 may qualify for Pandemic Unemployment Assistance (PUA). **You will need to apply for PUA to determine your eligibility under the program.** Additional information on how to apply for PUA can be found at https://www.iowaworkforcedevelopment.gov/pua-information.